United Nations

AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 788

Case No. 869: BONHOMME

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, Vice-President, presiding; Mr. Mikuin Leliel Balanda; Mr. Mayer Gabay;

Whereas, on 7 December 1993, Bernard Bonhomme, a former staff member of the United Nations Development Programme (hereinafter referred to as UNDP), filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 24 July 1995, the Applicant, after making the necessary corrections, again filed an application requesting the Tribunal:

"...

(c) To order ... the Respondent to pay to the Applicant, as compensation for this injury, the amount of six months' salary at the L-5, step VI level as of the date on which the Respondent formally agrees to pay the compensation awarded and orders payment;

(d) To state and rule that the Applicant's appointment expired on the date originally stipulated (20 August 1993) and that, owing to an early separation from

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service mutually agreed by the parties in accordance with the relevant provisions of the Staff Regulations and Rules, the Applicant has a legal and legitimate claim to the obligations owed to him by UNDP, the co-contracting party, from January 1993 onward;

(e) Consequently, to order the Respondent to pay the Applicant the total salary and benefits due him under the terms of his appointment for the period from January 1993 to 20 August 1993, ..., together with interest for delay at the current market rate in France, the Applicant's country of residence, for the entire period of unfulfilled obligations until the date of total and effective payment of the amounts owed;

(f) Additionally, to order the Respondent to pay to the Applicant, as compensation for the excessive delay in the payment of salary owed and compensation for the material, professional and moral injury caused by the Respondent's failure to fulfil his contractual obligations, in particular the lack of diligence on the part of the Administration and the failure to observe the relevant practices, rules and procedures of the Organization, an amount equivalent to six months' salary at the L-5, step VI level as at the date on which the Respondent formally decides to pay the agreed compensation and orders payment."

Whereas, on 28 August 1995, the Applicant submitted an additional memorandum in the light of developments which had arisen in his case subsequent to the initial filing of his appeal;

Whereas the Respondent filed his answer on 18 January 1996;

Whereas the Applicant submitted written observations on 12 February 1996;

Whereas the Applicant submitted an additional document on 30 September 1996;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Office for Project Services of UNDP on 21 August 1992 as Chief Technical Advisor in Djibouti on a one-year fixed-term appointment governed by the 200 Series of the Staff Rules, to expire on 20 August 1993. According to the report of the Joint Appeals Board (JAB), the Applicant had previously held various fixed-term appointments with UNDP in Cotonou (Benin), and Ouagadougou (Burkina Faso). His

appointment in Djibouti was terminated on 8 January 1993, nearly seven months prior to the expiration date. The Applicant had served three months of his one-year fixed-term appointment when the UNDP Resident Representative in Djibouti received a letter dated 22 November 1992 from the Minister of Agriculture and Rural Development of Djibouti in which the Minister stated: "the management of this project, i.e. the National Head of Project and the CTA [Chief Technical Advisor] provided by UNDP is completely unsatisfactory ... Consequently ... I should be grateful if you would consider relieving [the Applicant] of his functions ... and ... arrange for his replacement as soon as possible ..."

On 9 December 1992, the UNDP Resident Representative wrote to the Applicant as follows:

> "I regret to inform you that the Minister of Agriculture and Rural Development has asked me to relieve you of your functions ...
>
> Accordingly, this letter shall be considered to constitute one month's written notice from the date of receipt, and I should be grateful if you would contact our Administration Office to make the necessary arrangements for your departure."

In a fax dated 11 December 1992, the Assistant Administrator and Director of the Office for Project Services informed the Applicant of the following:

> "IN VIEW OF CIRCUMSTANCES PERTAINING TO CONTINUATION OF YOUR SERVICES IN DJIBOUTI AND DUE TO THE FACT THAT WE ARE UNABLE TO ASSIGN YOU ELSEWHERE, WE ARE PREPARED TO SUBMIT YOUR CASE TO ADMINISTRATOR OF UNDP FOR YOUR SEPARATION FROM SERVICE, EFFECTIVE 8 JANUARY 1993.
>
> YOU WOULD BE ENTITLED IN ACCORDANCE WITH ANNEX III OF THE STAFF REGULATIONS TO TERMINATION INDEMNITY, AMOUNTING TO SIX-WEEKS SALARY. PLEASE NOTE ANY ANNUAL LEAVE DUE YOU WILL BE COMMUTED TO CASH AND WILL BE INCLUDED IN YOUR FINAL ENTITLEMENTS."

In a letter dated 12 December 1992 addressed to the UNDP Resident Representative, the Applicant acknowledged receipt of the former's letter of 9 December 1992 and assured her of his "complete readiness during this month of notice to consolidate the progress made on the project (there has been some ...) and to prepare for the future". In her reply to the Applicant of 20 December 1992, the Resident Representative thanked him for his understanding with regard to the position taken by the Government of Djibouti concerning the project and expressed her regret that he had to leave prematurely.

On 11 January 1993, the Applicant left Djibouti. In a letter to the Office for Project Services dated 14 January 1993, the Applicant contended that his departure from Djibouti should not be considered a termination as understood in the Staff Rules:

> "As of now I am entirely at the disposal of the Office for Project Services for any mission to Headquarters or in the field until the expiration of my fixed-term appointment on 20 August 1993. ...
>
> ... fortunately, [the UNDP office] has not terminated my appointment under the Staff Rules (article IX, regulation 9.1 (b))."

In a letter sent through the Assistant Administrator and Director of the Office for Project Services to the Secretary-General on 19 February 1993, the Applicant claimed that his departure from Djibouti had not automatically terminated his appointment. He stressed that none of the communications he had received from the Office for Project Services constituted a termination of his appointment under the Staff Rules. He therefore requested a reassignment. He proposed that the time between his departure from Djibouti and the start of his new assignment should be considered as advance annual leave.

According to the report of the JAB, in a fax dated 22 February 1993, the Chief of Projects Personnel of the Office for Project Services had informed the Applicant that the date of his separation from the Organization had been revised to 11 January 1993, so that it would correspond with the date of his departure from Djibouti. According to the

Board's report, in a fax dated 25 February 1993, the Applicant acknowledged receipt of his "Separation Documents" but pointed out that:

> "These documents in no way modify the letter of appeal which I sent on 22 February 1993 [to the] Director of the Office for Project Services; ...
>
> This situation, which is extremely detrimental to me, even though I have done nothing to bring it on, does not constitute an early termination of an appointment in strict compliance with the Staff Rules."

On 14 February 1994, the Applicant appealed the decision to the JAB.

The JAB unanimously adopted its report on 4 May 1995. Its considerations, findings and recommendations read as follows:

> "29. The Panel first considered the question of receivability of the appeal. It noted that the appeal had been filed after the deadline established by staff rule 111.2 had expired. However, in view of the fact that the Appellant had been assigned in the field, and given the fact that he had continued to discuss the matter with various officials of UNDP at Headquarters, the Panel decided to receive the appeal exceptionally.
>
> ...
>
> 31. The Panel next considered the reasons for the termination of the Appellant's appointment. In this connection, the Panel noted that the Government had been dissatisfied with the project's lack of progress, which it largely attributed to the unsatisfactory performance of the Appellant. Accordingly, the Government had requested replacement of the Appellant in accordance with UNDP Regulations and Rules. Since this type of project is normally undertaken on the basis of a tripartite agreement, - the Government, UNDP and the executing agency - the Panel considered valid the Government's intervention.
>
> 32. Regarding the terms of the contract, the Panel reviewed first the Letter of Appointment which the Appellant signed upon receipt of a one-year contract. Paragraph 3 of that letter states in relevant parts:

'This appointment may be terminated prior to its expiration date in accordance with the relevant provisions of the United Nations Staff Regulations and Staff Rules in which case the Administrator of the United Nations Development Programme will give One Month written notice.

'Should your appointment be thus terminated, the Administrator will pay such indemnity as may be provided for under the relevant United Nations Staff Regulations and Staff Rules. (The normal expiration of the appointment at its term does not require the payment of any indemnity.)'

33. In view of the above, the Panel did not accept the Appellant's contention that UNDP had an obligation to retain him for the remainder of the contract period, namely seven months. The Panel therefore sought to establish whether or not the Respondent had complied with the relevant provisions of the Letter of Appointment and the Staff Regulations and Rules when he terminated the Appellant's appointment.

34. The Panel noted that under paragraph 3 of the Letter of Appointment mentioned above, it was stipulated that the appointment could be prematurely terminated. In accordance with both that paragraph and the provisions of staff rule 209.5 a termination indemnity was payable should the contract be so terminated. The schedule of the indemnity is set out in Annex III (a) to staff regulation 9.3. In accordance with that schedule the parties negotiated and accepted an amount equivalent to seven (7) weeks' salary, in lieu of the seven unserved months. The Panel further noted that thereafter, the Appellant was repatriated back to his native country, France.

35. The Panel also took note of UNDP's efforts, without success, to place the Appellant elsewhere. The Panel was of the view that indeed UNDP should have, as it did, made every effort to place him elsewhere in view of his past service. While regretting that those efforts had not materialized, the Panel nevertheless did not consider that UNDP had an obligation to retain the Appellant for the remainder of the contract period.

Findings and Recommendations

36. The Panel finds that the progress of the project had been unsatisfactory and therefore the Respondent acted in accordance with the Staff Rules and the terms of the Letter of Appointment, when he terminated the Appellant's fixed-term appointment.

37. The Panel further finds that the Appellant had participated in the negotiation for the amount of the termination indemnity and had agreed with the Respondent on that amount. The Panel also finds that the Appellant had been offered and had received the agreed amount of the termination indemnity.

38. The Panel, therefore, makes no recommendation in support of this appeal."

In a letter dated 1 August 1995, the Applicant was informed, in the following terms, that the Secretary-General had decided, in the light of the Board's report, to uphold the contested decision:

"The Secretary-General has examined your case in the light of the Board's report. The Board found that you had participated in the negotiations for the amount of a termination indemnity and had agreed on that amount. The Board also found that you had been offered and had received the agreed amount of the termination indemnity, and made no recommendation in support of your appeal.

Subsequently, your Counsel wrote to the Secretary-General on 10 May 1995 alleging that there was no evidence that a telex dated 23 December 1992, which documented your participation in the negotiation of an agreed termination, had been written or authorized by you. Although the proceedings were complete, and in view of the highly unusual situation, the Secretary-General made further inquiries and has now obtained additional information which fully supports the finding that you had, in fact, participated in the negotiations for the amount of a termination indemnity and agreed on that amount. Attached for your information are two documents from ..., a UNDP official who formally states that he translated into English a text prepared by yourself in French, that he explained to you the meaning of the English translation, and forwarded the text as a telex to [the Office for Project Services] on 23 December 1992, in his capacity of Administrative Assistant to the Resident Representative.

Consequently, the Secretary-General has decided to reject your appeal."

On 24 July 1995, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant did not agree to a termination of his fixed-term appointment. Given the absence of mutual agreement between the parties as to the early termination of his appointment, the Applicant was the victim of a unilateral breach of contract.

2. The rules governing early termination of fixed-term appointments were not observed by UNDP. Consequently the Applicant was denied the benefit of due process from the Organization in his appeal to the JAB.

Whereas the Respondent's principal contentions are:

1. The early termination of the Applicant's appointment by UNDP is consistent with the relevant procedures.

2. The terms of the early termination of the Applicant's appointment were mutually agreed by UNDP and the Applicant.

The Tribunal, having deliberated from 1 to 21 November 1996, now pronounces the following judgement:

I. The Tribunal must determine whether the Applicant's appointment was properly terminated with one month's notice and the payment of a corresponding indemnity of seven weeks' salary, or whether, as the Applicant contends, he was compelled to separate from service in Djibouti without having been properly terminated. In this case, the Administration would be required to pay him the salary due him for the period extending from the time of his departure from Djibouti to the date on which his contract would have expired.

II. The Applicant's appointment, concluded for one year, expressly stipulated that the Administrator of UNDP could terminate it prior to the expiration date by giving the Applicant

one month's notice and, in this case, paying him a termination indemnity as provided for under the United Nations Staff Regulations.

III. The Applicant was seconded to the Ministry of Agriculture of Djibouti on 21 August 1992 as Chief Technical Advisor of a project entitled "Master plan for the development of water resources." As of 27 November, however, the Ministry of Agriculture requested the UNDP Resident Representative to replace the Applicant even though the project in question had not been started and no programme had been developed. The Ministry's request was communicated to the Applicant by the UNDP Resident Representative in a letter dated 9 December 1992, in which it was clearly stated that: "[T]his letter shall be considered to constitute one month's written notice from the date of receipt."

The Applicant left Djibouti on 11 January 1993. However, prior to his departure, a fax sent to Djibouti and signed by the UNDP Resident Representative indicated that the Applicant was requesting a termination indemnity of seven weeks' salary, and the Applicant's actual receipt of the indemnity is not in dispute.

IV. It thus appears to the Tribunal that the Applicant's appointment was terminated in accordance with the terms of rules 209.4 and 209.5 of the United Nations Staff Rules and the terms of his letter of appointment in so far as both notice and the termination indemnity were concerned. This conclusion must, however, be confirmed in the light of the Applicant's contentions.

V. The Applicant maintains that he was not actually given notice that his appointment was being terminated and bases this contention on the somewhat elliptical terms of the letter sent to him on 9 December 1992 by the UNDP Resident Representative. In the Applicant's view, the notice referred to in the letter constituted nothing more than "the fixing of the date

of the Applicant's departure from Djibouti pursuant to the request from the Minister of Agriculture to the Resident Representative". The Tribunal does not accept this line of argument. It is in fact clear that the notice to which the UNDP Resident Representative referred could only be, under the circumstances, the notice specified in the Staff Rules and the Applicant's letter of appointment, whereas the notion of a "notice of departure" having the same duration is devoid of any legal or logical foundation.

VI. The Applicant maintains that he was not party to any negotiations or any agreement concerning the termination indemnity fixed at seven weeks of his salary. The Respondent, however, maintains that the indemnity was determined with the Applicant's agreement, and introduces in this connection the testimony of the Chief of Administration of UNDP in Djibouti at the time. The Tribunal sees little purpose in pursuing this matter further, particularly since the Applicant did receive the indemnity in question, thereby indicating his acceptance; the Tribunal understands this to mean that the Applicant was given notice of his termination. The Applicant's argument that the amount "should be claimed against his entitlements and leave or future earnings" is not convincing to the Tribunal.

Lastly, the Applicant maintains that the UNDP Resident Representative was not competent to give him one month's notice with a view to his termination. In the Applicant's view, that competence should have been vested in the Administrator or Chief of Personnel of UNDP. The Tribunal considers that in any case the decision of the Resident Representative, empowered to act on behalf of UNDP in the field, was confirmed by her hierarchical superiors in UNDP.

VII. The Tribunal notes that the Applicant has not proved that his termination was carried out improperly.

VIII. Accordingly, the Tribunal rejects the application.

(Signatures)

Hubert THIERRY
Vice-President, presiding

Mikuin Leliel BALANDA
Member

Mayer GABAY
Member

New York, 21 November 1996

R. Maria VICIEN-MILBURN
Executive Secretary